and 5 hereto annexed, are photostatic copies of the title page and pages 126, 127 and 198 thereof.

5. That he has seen advertised at page 107 of the magazine "Apparel Arts" for July, 1944, a photograph of a gabardine shirt identified by the name "Tailspin" purported to be manufactured by Cavu Clothes, of Cincinnati, Ohio; that the shirt illustrated in that magazine appealed to him as a type of garment that he wished to exhibit in the exhibition he was preparing for The Museum of Modern Art in New York City. He thereupon wrote a letter on July 24, 1944, to Cavu Clothes, Transportation Building, Cincinnati, Ohio, requesting a photograph of the "Tailspin" gabardine shirt pictured in "Apparel Arts" magazine for July 1944, at page 107. This letter was replied to by M. M. Brohard, Jr. of Cavu Clothes, on July 27, 1944, in which he, Rudofsky, was asked what he intended to use the photograph for and this was explained in his (Rudofsky's) reply letter of August 1, 1944, to which a reply was made by M. M. Brohard, Jr., on August 24, 1944. The Brohard letter of August 24, 1944 was answered by said Rudofsky on September 5, 1944; that plaintiff's exhibits 6, 7, 8, 9, and 10 annexed hereto, are photostatic copies of an exchange of letters between said Rudofsky and said Cavu Clothes, Inc. and M. M. Brohard, Jr. of Cavu Clothes, Inc. of Cincinnati, Ohio, respectively.

6. That the photograph shown on exhibit 4 hereof was produced from a photograph obtained from Montie M. Brohard, Jr., of Cincinnati, Ohio, at his (Bernard Rudofsky's) request, first made by him by letter, exhibit 6 hereof.

7. That the statements which he made in his book "Are Clothes Modern?", at page 127, including the italicized statement appearing at the top of page 127, exhibit 4 hereof, were composed by him and represent his own views of the

subject matter there expressed, and that the statement made in the first paragraph on page 198, concerning garments modeled from the simplest of geographical patterns, like rectangles or triangles, had reference to garments of the type illustrated at said page 127 of his said book.

Cincinnati, Ohio,
January 14, 1949.

ZUGELTER & ZUGELTER
By GERALD B. TJOFLAT
ZUGELTER & ZUGELTER
NICHOLS, WOOD, MARX & GINTER
Counsel for Plaintiffs

Chicago, Illinois,
January 17, 1949.

HINKLE, HORTON, AHLBERG, HANSMAN & WUPPER
By WARREN C. HORTON
Attorneys for Defendant.

Bernard Rudofsky

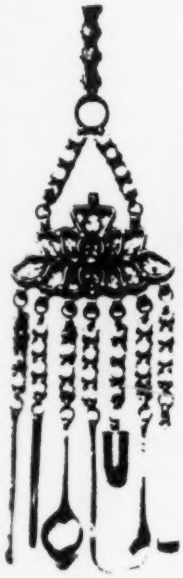
are clothes modern?

An essay on contemporary apparel

Paul Theobald 1947

Plaintiffs' Exhibit 2 - Civil 1847 Cavu v. Squires (Stipulation)

The editor of a servicemen's magazine received many thousands of letters from dissatisfied men. Analyzing their claims, it appeared that the sailor's uniform excelled all others in compliance with the pocket and button ceremonial. Its pockets are mainly ornamental: sailors "have to carry cigarets in the socks, a wallet hung over the pants top and a handkerchief on the shoulder. These things are always getting lost. The jumper, so difficult to put on and take off that it is necessary to brush one's hair after every operation, is another source of inconvenience, while the thirteen buttons on the pants cause more consternation than respect for the fact that they are supposed to commemorate the thirteen original American colonies."[3] When we further hear that the distasteful uniform keeps reservists from staying in the Navy and even Army men from transferring to the Navy, it becomes obvious that the policy adopted by the Uniform Board in Washington is detrimental to the moral of fighting men.



The fashionable Tibetan woman can dispense with a handbag. Her necklace contains tooth pick, ear spoon, tongue scraper and other essential toilet articles.

From Buschan, Sitten der Volker.

A fully dressed man of the twentieth century commands the use of two dozen pockets. Assuming that they could all be utilized and loaded with things — pockets originated as useful appendages — the sorting out and filling up, the extracting of the pocketed objects would be a stately business. The superintending, listing and balancing of the cargo of twenty-four pockets is a task comparable to that of loading a ship. But, as the ballast would seriously injure his sartorial entity, fashion decreed that the authentic gentleman does not carry any cargo, least of all should he take advantage of the capacity of his twenty-four compartments. (An exception from this rule is the breast-pocket, holding a handkerchief: but to nullify the exception, this handkerchief in turn was declared non-utilitarian.) Here again, we witness degeneracy of functional clothing. The perfectly legitimate and helpful institution of the pouch as attached to a garment in the form of a pocket, goes rampant until, through its overgrowth, the original scope gets lost, and it ends up in decorative silliness.

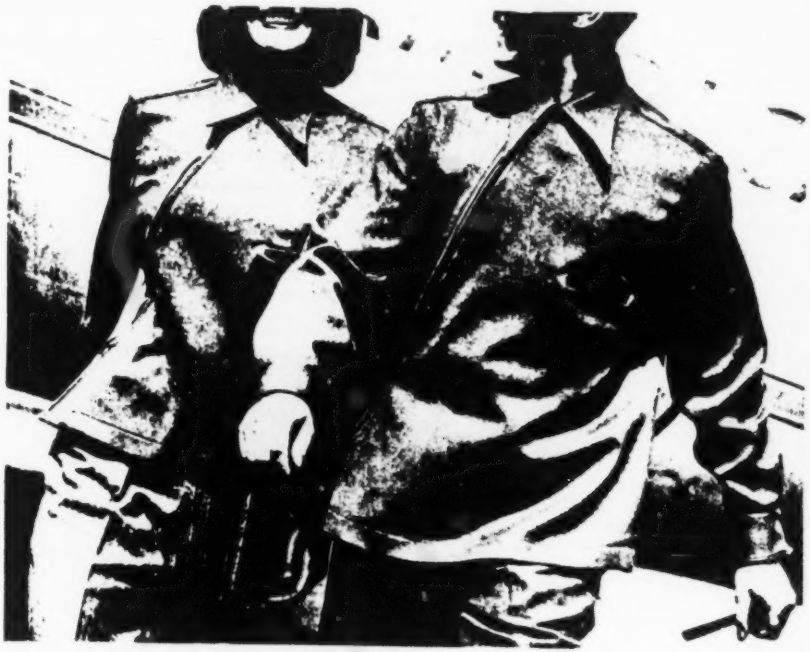
Technically, the button is a most unsatisfactory looking apparatus, a hangover from — possibly — the neolithic age. On modern garments, buttons grow like fungi. They erupt periodically on female articles in unsuspected places while they are kind of ingrown into the male wardrobe. The pockets of the male outfit are complemented by six to seven dozen buttons, functional, magical and otherwise. Only a minority of them afford the refuge of a buttonhole; the rest remain at large. Buttons are vulnerable. The end comes to them quicker than to the garment itself. Buttons come loose or splinter, thanks to mechanized laundering; buttonholes of the manufactured suit are apt to contract a chronic infirmity similar to scurvy.

The slide fastener, still in its teens and sometimes awkward, is of singular interest for it might put an end to an age-old custom born from superstition: the distinction between male and female clothing by buttoning right and left. There is no doubt as to the dual character of present-day clothes. Any piece of fabric can be charged with sexuality by simply working it into a precise

Plaintiffs' Exhibit 3, (Rudofsky Stipulation) Cavu v. Squires
Civil 18-7

This shirt is remarkable for its departure from the archaic system of male and female garments, as distinguished by buttoning right and left. It represents an asexual shirt, so to say, and may be worn by men and women alike, without their being accused of transvestism.

Courtesy Cara Clothes, Inc.



shape. The resulting form might determine the actual sex. The artist can imbue dead material with that precise meaning. He may resort to realism or symbolism: he may choose to produce an image of the human form, or he may substitute for it any significant part of the body. His is the straight way of expression which is known to us since prehistoric time. But the impermeation of sexual meaning into clothes is of later and more subtle work.

The overlap of a blouse, a jacket or a coat determines the sex of the article. By buttoning a garment on the right side, it becomes suitable for men only and definitely unsuitable for women. Whatever the quaint explanations of folklore are, the right side of the body has always been male, the left side female: this orientation survived despite its irrationality. As the slide fastener can do without an overlap, this leaves us without a cue to the sex of clothing. In fact, some shirts which solely use the sliding device, are already made in one single edition for both sexes. If, through the diffusion of the asexual slide fastener the use of buttons declines—they disappeared already from our shoes—the arbitrary distinction between men's and women's clothing will vanish more rapidly.

Plaintiff's Exhibit 4 (Rudofsky stipulation) Cara v. Esquire Civil No. 18,47

rest. It is quite evident that anatomical fitting can only be achieved by the use of homogenous and stretchable materials. How then, shall textiles be put to intelligent use?

It would be a good thing to forget for a moment about scissors and knives. A few years ago, the idea of un-cut modern clothes would have seemed preposterous. But meanwhile, a handful of genuine talents among American designers began to investigate the feasibility of garments modeled from the simplest of geometric patterns, like rectangles or triangles. Already, these few experiments brought forward more basic designs than were produced by all the clothes makers of the last hundred years put together. However, a radical departure from the humdrum of the tailor's pattern is for the present only conceivable in the new field of so-called play-clothes.

True inventiveness in design is practically restricted to play-clothes, a category of dress which, in time, may become the starting-point for the creation of a genuine contemporary apparel.

Designer: Claire McCardell. Courtesy Life *magazine.*

Plaintiffs' Exhibit 5 (Rudofsky stipulation) Cavu v. Squires Civil 1847

Plaintiff's Exhibit 11

(Letterhead of The Museum of Modern Art)

July 24, 1944

Cavu Clothes
Transportation Building
Cincinnati, Ohio

Dear Sirs:

Would you be kind enough to furnish us a photograph of the "Tailspin" gabardine shirt pictured in *Apparel Arts* of July 1944, page 107? We are very anxious to have this photograph.

Sincerely yours,

/s/ Bernard Rudofsky

Bernard Rudofsky

BR/vm

Plaintiff's Exhibit 11

(Letterhead of Museum of Modern Art)

27 July 1944

The Museum of Modern Act.
11 W. 53rd St.,
New York 19, N. Y.
Attention, Mr. Bernard Rudofsy,
Director of Apparel Research.

Dear Mr. Rodofsky:

We are very flattered to have received a request from your famous organization for the picture of our new "Tailspin" shirts. Enclosed, is the protograph that you have requested which has appeared in Apparel Arts Magazine of July 1944, Page No. 107.

I don't want to appear too naive about this thing, but would you mind writing me briefly, advising me how you intend to use this picture. I presume that you intend to use it on a display of contemporary wearing apparel; and if you do, I would appreciate your advising me the dates of this display, because I make frequent trips to New York, and I am particularly interested in seeing the display in which this picture will be featured.

Incidentally, we have several other shots of the "Tailspin" shirt, some of which are shown with the shirt being worn inside the trousers. If you would be interested in seeing the additional photographs that we have on hand of the "Tailspin" shirt, please advise me, and I shall be happy to forward them to you immediately.

Assuring you of our anxiety to cooperate with you in every way possible and pleasantly anticipating your reply, we are

Yours with sincerity,
CAVU Clothes
M. M. Brohard, Jr.

9

P.S. I am also enclosing a reprint of the Apparel Arts page.
Copy—Miss Beryl Christian

Plaintiff's Exhibit 11

(Letterhead of The Museum of Modern Art)

August 1, 1944

Dear Mr. Brohard:

Thank you for your letter of July 27th, and the photographs and clipping of your "Tailspin" shirts. Eventually I would like to use the photograph or the actual garment for a forthcoming exhibition. The date of this show will be announced within a fortnight, and I shall, then, let you know more about it.

I certainly would appreciate your sending me other shots of the "Tailspin" shirts or any other garment that deviates from sartorial conventions.

Thank you again.

Sincerely yours,

/s/ Bernard Rudofsky

Bernard Rudofsky

Mr. M. M. Brohard, Jr.
Cavu Clothes
Transportation Building
Cincinnati 2, Ohio
BR/vm

Plaintiff's Exhibit 11

24 August 1944.

Museum of Modern Art,
11 W. 53rd St.,
New York 19, N. Y.

Attention, Mr. Bernard Rudofsky.

Dear Mr. Rudofsky:

Enclosed are some additional pictures of the "Tailspin" shirt, in both the men's model and the De-Icer model.
You mention in your letter of August 1st, that you might want to use an actual garment for your forthcoming exhibition. Just as soon as you are sure of the exact date of your exhibition, kindly advise me and I shall be happy to send a garment to you for display. I would be glad to send it to you immediately, but for the fact that we are about two months behind in our production schedule, and I need to keep every sample garment working as much as possible. Nevertheless, I am very flattered that you want to display our shirt, so that if you are ready for the shirt immediately, I shall be happy to send it to you as soon as I hear from you.
Again thanking you for your congenial cooperation, and awaiting your advice as to the exact dates of your exhibition, I am

Yours with sincerity,
CAVU Clothes
M. M. Brohard, Jr.

9

Plaintiff's Exhibit 11

(Letterhead of The Museum of Modern Art)

September 5, 1944

Dear Mr. Brohard:

Thank you very much for your letter of August 24 and the additional pictures of the "Tailspin" shirt, which were enclosed.

I am very glad you will be able to lend us one of these shirts for the exhibition. It is scheduled to open at the Museum on November 28, and I will let you know very soon which model I should like to have for display.

I appreciate very much your cooperation.

Sincerely yours,

/s/ Bernard Rudofsky

Mr. M. M. Brohard, Jr.
Cavu Clothes
Transportation Building
Cincinnati 2, Ohio

BR:mm

DEFENDANT'S EXHIBIT A

AGREEMENT

IT IS HEREBY MUTUALLY UNDERSTOOD AND AGREED by and between THE MACK SHIRT CORPORATION, of Cincinnati, Ohio, and MARLBORO SHIRT COMPANY, of Baltimore, Maryland, as follows:

1. Mack holds an exclusive license from Cavu Clothes, Inc., to manufacture and sell men's and boys' shirts under Cavu's U. S. Patent D-146895, except in certain fabrics which have been reserved by Cavu.

2. Mack, as authorized by said license, hereby grants to Marlboro a license to manufacture men's and boys' shirts under said patent and under the terms and conditions herein set forth.

3. Marlboro will pay directly to Cavu Clothes, Inc., of Cincinnati, Ohio, a royalty equal to two (2%) percent of the wholesale list price of all shirts manufactured and shipped under this agreement, payable to be made monthly in accordance with a certificate furnished to Cavu with copy to Mack, as to the number of shirts shipped during the preceding month. Cavu may check Marlboro's records on production and shipment at any reasonable times.

4. Subject to termination as hereinafter provided, this license will extend until June 30, 1952.

5. Marlboro will market all shirts produced under this agreement under the "Spitfire" label, on which the following will appear prominently:

Licensed and styled by CAVU
U. S. Patent D-146895

Should the aforementioned design patent be held to be invalid by a court decision from which no appeal is or can be taken, this agreement may be cancelled at Marlboro's

option on written notice to Mack, but such termination shall not affect any rights, duties or royalties accrued prior to the date of such termination. It is further understood that in the event that there is substantial infringement of said patent which materially affects the Marlboro business in said shirts, Marlboro may give Mack written notice to take legal action against such infringers. In the event Mack should fail, after such notice, to bring legal action within ninety (90) days and to prosecute the same diligently, Marlboro should have the option to terminate this agreement under the conditions hereinabove set forth. Marlboro will fully cooperate with Mack in such suits or other actions to defend and enforce said patents.

7. It is understood that Mack may terminate this agreement on thirty (30) days written notice if Marlboro should produce and ship less than 9750 dozen such shirts in any consecutive six months period ending June 30, 1948, or thereafter, provided any such notice must be served within sixty (60) days of the end of the six month period in which such failure occurred and provided that reasonable allowance will be made in the event Marlboro's production and distribution is substantially impaired by fire, strike, flood, act of God, or other cause beyond its control.

9. This agreement authorizes Marlboro to manufacture such shirts up to March 31, 1948, in any fabrics other than those listed in Schedule A hereto attached and made a part hereof.

10. It is further understood that after March 31, 1948, Marlboro shall not manufacture any such shirts using any of the fabrics listed in Schedule A or any other fabrics containing more than sixty (60%) percent wool or other animal matter.

hands in duplicate as of July 1, 1947, by the officers hereinbelow named, the same being duly authorized in the premises.

Witnesses as to Mack: THE MACK SHIRT CORPORATION

_____ By _____
RICHARD J. MACK, *President*
and

_____ By _____
URBAN P. GUCKES, *Vice President*

Witnesses as to Marlboro: MARLBORO SHIRT COMPANY

_____ By _____
ISADORE ROSENBLOOM, *President*

_____

August 22, 1947

SCHEDULE "A"

Galey & Lord	—	Beachclub
Galey & Lord	—	Fieldclub
D. B. Fuller & Co.	—	Excelwear
A. D. Juilliard & Co.	—	Featheroy
A. D. Juilliard & Co.	—	Zephyroy
Crown Fabrics	—	SOAP 'n' WATER Gabardine
Lesem Bach & Co.	—	Kohinoor
Sea Island Mills	—	Ramie Cloth
Sea Island Mills	—	Style 6026 Gabardine
Greenwood Mills	—	Style 3088 Rayon Gabardine

DEFENDANT'S EXHIBIT B

(Mack Shirt Corporation Letterhead)

June 12, 1947.

Mr. Montie Brohard, Jr., President
CAVU Clothes, Inc.
Transportation Building
Cincinnati, Ohio

Dear Montie:

In accordance with our discussion this morning, we hereby agree to continue our arrangement for distributing your Tailspin model shirts, under the following terms and conditions:

1. We will pay you a royalty of ..... per dozen on all shirts of this model shipped by us beginning July 1, 1947, payment to be made monthly in accordance with certificate furnished by us as to the number shipped during the preceding month. You or your agent may check our records at reasonable times.
2. Subject to termination as hereinafter provided, we will be granted a five (5) year license to be the sole manufacturers and distributors in the United States and foreign countries of your Tailspin model shirt in ..... fabrics for men and boys.
3. It is understood that we will market this shirt under our present label, with additional patent reference, so that the label will read:

FLIGHTMASTER by Mack
Licensed and Styled by CAVU
U. S. Pat. D-146895

4. We will take steps immediately to obtain the necessary machines and equipment so as to increase the

volume of production by manufacturing this shirt in one of our own factories.

5. It is understood that a design patent on the Tailspin model shirt has been issued to you, and an application for a mechanical patent is pending. Should the design patent be held invalid then at our option we may terminate this agreement on written notice to you but such termination shall not affect any charges accrued hereunder to date of such termination. It is further understood that you will use reasonable efforts to prevent infringement of your design patents and that in the event of your failure to use what in our opinion are reasonable efforts, we shall have the right to terminate this agreement on written notice to you but without effect on charges accrued to date of termination. In the event of termination for either of these reasons, neither of us shall be under any liability to the other, except, of course, we shall be liable for any royalties unpaid at date of termination.
6. It is understood that you may terminate this agreement on thirty (30) days' written notice if we should pay you royalties on less than Thirteen Thousand (13,000) shirts in any consecutive six (6) months ending June 30, 1948, or thereafter, or on less than Thirty-nine Thousand (39,000) shirts in any consecutive six (6) months ending December 31, 1948, or thereafter, provided any such notice must be served within sixty (60) days of the end of the six (6) month period in which such failure occurred and provided that reasonable allowance will be made in the event our production and distribution is substantially impaired by fire, strike, flood, act of God, or other cause beyond our control.

Defendant's Exhibit B

7. It is understood that we are to have a free rein in selling these shirts according to our selling policy.
8. Any garments which are sold as seconds or imperfects shall not be subject to license fee.

If this arrangement is satisfactory to you, will you sign and return to us the enclosed copy of this letter, which will then constitute an agreement between us on the terms and conditions here set forth.

Looking forward to a mutually profitable and satisfactory relationship,

Very truly yours,
THE MACK SHIRT CORPORATION
By /s/ RICHARD J. MACK,
President.

Approved and Accepted:
June 13, 1947.
CAVU CLOTHES, INC.
By /s/ MONTIE M. BROHARD, JR.,
President.

I hereby certify that CAVU Clothes, Inc. has the right to make the foregoing agreement and as the present record owner of the patent and patent application referred to, I agree thereto.
Dated: June , 1947.

/s/ MONTIE M. BROHARD, JR.
MONTIE M. BROHARD, JR.

DEFENDANT'S EXHIBIT D

MODIFICATION OF AGREEMENT

It is hereby mutually understood and agreed by and between CAVU CLOTHES, INC., and the MACK SHIRT CORPORATION, both Ohio corporations, as follows:

1. The agreement between the parties heretofore made and dated June 12, 1947, and modified as of July 1, 1947, is further modified in the following respects, but in all other matters is hereby reaffirmed.

2. Suits have been brought in the name of CAVU to enforce the patents involved in the former agreement, and it is contemplated that additional suits may hereafter be brought; provided, however, that if expenses are to be borne as provided in this modification, then such suits hereafter shall be brought only with the consent of both CAVU and MACK. It is hereby understood that in the prosecution of said suits the cash expenses for court costs, telephone and telegraph, railroad, hotel, etc., and witness fees, including all out-of-pocket cash expenses involved in the preparation and prosecution of said suits, shall be borne equally by the parties.

3. Said suits have been brought by the firm of Zugelter and Zugelter as patent attorneys and by the firm of Nichols, Wood, Marx & Ginter, as general attorneys. In some instances, other general attorneys have been engaged as local counsel. CAVU will pay the fees of said patent attorneys and of any other patent attorneys who may participate in the prosecution of said cases. MACK will pay the fees of the general attorneys and of any other general attorneys who may participate in the prosecution of said cases.

4. In the event of recovery in one or more of said suits, it is understood that out of the recovery the aforementioned

cash expenses shall first be paid. From said recovery the fees of both the patent and the general attorneys shall then be paid. If the amount available is insufficient to pay all of said fees it shall be applied equally toward the payment of the patent attorney fees and those of the general attorneys. Any excess of the recovery after payment of said cash disbursements and attorneys' fees shall then be divided equally between CAVU and MACK.

IN WITNESS WHEREOF, the parties have hereunto set their hands this fifth day of May, 1948.

CAVU CLOTHES, INC.
By /s/ MONTIE M. BROHARD, JR.,
MONTIE M. BROHARD, JR.,
President.

THE MACK SHIRT CORPORATION
By /s/ RICHARD J. MACK,
RICHARD J. MACK,
President

DEFENDANT'S EXHIBIT E

SUPPLEMENTARY AGREEMENT MODIFYING LICENSE CONTRACT OF JUNE 12, 1947

It is hereby mutually understood and agreed by and between THE MACK SHIRT CORPORATION and CAVU CLOTHES, INC., that the contract of June 12, 1947, between the parties by which MACK was licensed to produce shirts under CAVU's United States Patent D-146895, is modified in the following respects and in all other regards is hereby ratified and confirmed:

1. MACK is authorized to grant a sublicense to Marlboro Shirt Company, Inc. for the manufacture of men's and boys' shirts, the shirts to be manufactured by Marlboro to be designated as "Spitfire," with royalties at the rate herein provided, to be payable by Marlboro direct to CAVU and with other terms and conditions not inconsistent with those set forth in the license contract from CAVU to MACK, dated June 12, 1947, as modified by this supplementary agreement.

2. The royalty to be paid by MACK on all shirts shipped by it under this agreement on and after July 1, 1947, shall be ..... percent of the whole sale list price thereof.

3. MACK is authorized to manufacture and sell men and boys' shirts under this license in any fabrics up to March 31, ... and thereafter to use any fabrics containing not over ..... percent of wool or other animal matter.

4. MACK shall have the right to determine whether legal action should be taken against any parties infringing or thought to be infringing on said patent or upon the related mechanical patent for which application is now pending. Any such action shall be taken by MACK in its own name and at its own expense. In the event MACK should obtain recovery from any such infringers, MACK may first deduct all of its expenses in connection with such

action and thereafter divide evenly any excess between MACK and CAVU until CAVU'S share equals ..... of the wholesale list price of shirts manufactured and sold by such infringers. Any excess over such amount shall be retained by MACK. In the event that in the opinion of CAVU any third party is infringing on said patent, or upon the related mechanical patent for which application is now pending, CAVU may at any time make written request to MACK to file a patent infringement suit, as hereinabove provided. The decision as to the bringing of such suit by Mack shall rest in its sole discretion but in the event that within ninety (90) days after such request MACK does not file such suit, CAVU may file such suit in its own name and at its own expense, and in such event shall be entitled to all recovery, if any, obtained in such proceedings or in any settlement thereof.

In the event any party shall bring suit or take other legal action against CAVU involving the validity of said design patent or the related mechanical patent, MACK will have the right, at its option, to join with CAVU in conducting the defense, each party bearing its own expense.

5. This supplementary agreement shall be effective in all respects as of July 1, 1947.

THE MACK SHIRT CORPORATION
By /s/ RICHARD J. MACK,
RICHARD J. MACK,
President.

CAVU CLOTHES, INC.
By /s/ M. M. BROHARD, JR.,
M. M. BROHARD, JR.,
President.

WITNESSES:
/s/ LEONARD D. SLUTZ,
/s/ JANE RUNGE,
/s/ VIRGINIA L. NIESEL,
/s/ THELMA L. LAWRENCE.

Who Wouldn't Open Their Mouths and Say "Ah!"

Angelica's side-buttoning smocks have long been outstanding favorites . . . for comfort . . . for appearance . . . and for long wear. Made of Angelica's exclusively woven White **Twill.** Indestructible knot buttons. Pleated back. **Sizes:** 34 to 48.

Ⓐ **41 TD 8**—Short sleeves.

Ⓑ **41 TD 9**—Long sleeves.

•

PAGE 4

•

Here's one of the smartest looking, most practical smocks ever created. Professionally styled with a convenient easy-action zipper and pleated back . . . and for comfort can be worn without shirt, collar and tie. Offered in two appropriate Sanforized-Shrunk materials, short or long sleeves. **Sizes:** 34 to 48.

ANGELICA WHITE TWILL
Sanforized-Shrunk

Ⓒ **41 TDS 28**—Short sleeves.

Ⓓ **41 TDS 29**—Long sleeves.

TAN SHANTUNG-WEAVE POPLIN
Sanforized-Shrunk

★ **325**—Short sleeves.

★ **326**—Long sleeves.

ANGELICA JACKET CO.
ST. LOUIS
CHICAGO
NEW YORK LOS ANGELES

Angelica White Twill smocks are well liked for their professional appearance and pleasing comfort. Made of Angelica's specially woven White **Twill**, with pleated back and indestructible Knit buttons. **Sizes:** 34 to 48.

(E) **41 TD 19**— Long sleeves.

(F) **41 TD 18**— Short sleeves.

(G) **377—Professional Coat** of Santorized-Shrunk Angelica White **Twill**. Opens diagonally down front with concealed zipper. Pleated back. **Sizes:** 34 to 44.

•

(H) **378—Professional Coat,** smartly styled of Santorized-Shrunk Angelica White **Twill** with concealed zipper front opening and pleated back. Belt is attached in back, buttons in front with sewed-on pearl buttons. **Sizes:** 34 to 44.

STIPULATION RELATIVE TO DESIGNATION FOR RECORD ON APPEALS

It is hereby stipulated, by and between counsel for the parties hereto, that there may be a single printed record on appeal for both appeals herein, which shall contain only the following:

1. Bill of complaint.
2. Answer filed March 16, 1948.
3. Defendant's interrogatories filed March 31, 1948.
4. Plaintiffs' answers to interrogatories filed May 18, 1948.
5. Amendment to plaintiffs' answers to interrogatories, and affidavit, filed June 18, 1948.
6. Plaintiffs' answers to interrogatories 8 and 15, filed June 25, 1948.
7. Defendant's notice of additional defenses.
8. Amendment to answer.
9. Order making The Mack Shirt Corporation a party plaintiff.
10. Entry of appearance and complaint of The Mack Shirt Corporation.
11. Findings of fact and conclusions of law entered July 18, 1949.
12. Decree entered July 18, 1949.
13. Notice of appeal filed by plaintiffs.
14. Notice of appeal filed by defendant.
15. The whole of the transcript of testimony taken at the trial, with the exception of the following:

Cover page.

Index.

Pages 4 to 18 inclusive and page 19 to the Heading "Nathan Kaplan."

Stipulation Relative to Designation for Record on Appeals

Page 21, Statements by Judge Marx and Mr. Horton.

Page 53, Questions and answers between counsel at top of page.

Page 69, Interjection by reporter and first following sentence.

Page 71, Comments re: adjournment.

Page 126, Beginning three lines from the bottom, through page 128 inclusive.

Page 169, Colloquy regarding Mr. Burns at bottom of page.

Page 261 to 263 inclusive, heading "Proceedings" and statement of "good morning" at top of page 264.

Page 270, the portion following the words "we have a deposition, if Your Honor please" inclusive to the offer of Exhibit 14 on page 271.

Page 271, after the first sentence by Mr. Horton through the remainder of Mr. Horton's statements ending on page 272, near the top.

Page 273, beginning the paragraph "Now I should like to call the Court's attention . . . through the bottom of the page.

Page 274, except the identification and receiption of Exhibit "F."

Page 275, its entirety.

Page 276, except the offer and acceptance of Exhibit "G."

Pages 277 to 281 inclusive, except the offer and acceptance of Exhibit "H" on page 281.

Pages 282 to 287 inclusive, except the offer and acceptance of Exhibit "I" on page 287.

Pages 288 to 291 inclusive, except the offer and acceptance of Exhibit "J" on page 291.

Page 292, except the offer and acceptance of Exhibit "K."

Page 293, except the offer and acceptance of Exhibit "L."

Page 294, except the offers and acceptances of Exhibits "M," "N" and "O."

Page 295, except the offer and acceptance of Exhibit "P" and except the last paragraph.

Page 296, except the acceptance of Exhibit "Q," the offer of Exhibit "Q" and the offer and acceptance of Exhibit "R."

Pages 297 and 298, in their entirety, except the words on page 298, "I'll offer the deposition taken at the Fox-Knapp Manufacturing Company, as defendant's Exhibit "S."

Page 300, the last two paragraphs continuing on to the top of page 301.

Page 301, following the receipt of Exhibit "T," also omitting all of page 302 and the first two lines of page 303.

Page 303, from the receipt of Exhibit "T-2" to and including the third statement by Judge Druffel found on page 306.

Page 307, from the receipt of Exhibit "U-2" to and including the words "Rhode Island and elsewhere were produced. I asked,".

Page 311, from the receipt of Exhibit "U-6" to page 312, ending with the words, "and he identified the price list previously offered.

Page 312, beginning after the receipt of Exhibit "U-8" to, but not including the third statement of Mr. Horton on page 313.

Page 315, the two paragraphs immediately following the receipt of Exhibit "V-4."

Page 315, from the receipt of Exhibit "V-5" to, but not including, the words of Mr. Horton on page 317, beginning "I offer as defendant's Exhibit "W". . . ."

Portion from the receipt of Exhibits on page 358 to the end of the typewritten transcript.

16. Deposition of Sue S. Dauser, with the exception of the notice and the certificate of the Notary appearing on pages 16 and 17.

17. The depositions taken at Chicago of Louis Karger, Annebelle Wright, and Lillian Levy, with the exception of pages 2 and 3; page 35, line 21 through page 36; page 72, and copy of notice.

18. Depositions taken at New York of David B. Knapp, Max J. Lovell, and William MacMullen, with the exception of page 50, line 9 through page 53.

19. Depositions taken at Baltimore, Maryland, with the exception of pages 1 and 2; page 3, line 17 through line 2 on page 6; page 41, line 8 through the bottom of page 46; page 62, line 21 through bottom of page.

20. The following exhibits:

a. Plaintiffs' Exhibit 3—Brohard design patent.

b. Plaintiffs' Exhibit 4—Brohard mechanical patent.

c. Plaintiffs' Exhibit 11—Rudofsky stipulation.

d. Defendant's Exhibit A—Marlboro-Mack license.

e. Defendant's Exhibit B—Brohard-Mack license.

f. Defendant's Exhibit D—Cavu-Mack modification of license.

g. Defendant's Exhibit E—Cavu-Mack supplementary agreement.

h. Defendant's Exhibit V-1—Angelica 1941 professional catalog (pages 4 and 5 only).

21. This stipulation.

It is further stipulated that the whole of the transcript of the record of the trial, together with the whole of the transscript of the various depositions referred to herein, and the originals of all the plaintiffs' and defendant's exhibits, whether specifically designated herein to be printed or not, should be transmitted to the Court of Appeals as physical exhibits, provided the District Court enters an agreed order to such effect. It is further stipulated that either counsel may incorporate in his brief or physically submit to the Court of Appeals, duplicates of any of the exhibits.

It is further stipulated that the cost of printing of the record, including exhibits therefor, shall be paid initially half by the plaintiffs and half by the defendant, and that costs, including such expenses, shall abide by order of the Court.

/s/ LEONARD D. SLUTZ,
Counsel for Plaintiffs.

/s/ WARREN C. HORTON,
Counsel for Defendant.

CLERK'S CERTIFICATE

United States of America, Southern District of Ohio, Western Division, ss:

I, Howard Parker, Clerk of the District Court of the United States within and for the District and Division aforesaid, do hereby certify that the foregoing pages contain a true, correct and complete copy of those portions of the record and proceedings in the above entitled cause indicated in the Stipulation as to Record on Appeal filed

.....

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of said Court, at the City of Cincinnati, Ohio, this .. day of ..... A. D. 1948.

HOWARD PARKER,
Clerk.

By .....
Deputy.

TRANSCRIPT OF PROCEEDINGS

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CAUSE ARGUED AND SUBMITTED

(April 5, 1950)

Before Hicks, Chief Judge, Simons and Miller, Circuit Judges.

These causes are argued by Robert S. Marx for Cavu Clothes, Inc., et al., and by Warren C. Horton for Squires, Inc. and are submitted to the Court.

JUDGMENT No. 11,054

(Entered September 8, 1950)

APPEAL from the District Court of the United States for the Southern District of Ohio.

THIS CAUSE came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Ohio, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered adjudged and decreed by this Court that the decree of the said District Court in this cause be and the same is hereby reversed.

/s/ SHACKELFORD MILLER, JR.,
Circuit Judge.

OPINION

CAVU CLOTHES, INC.,
MONTIE M. BROHARD, JR., and
THE MACK SHIRT CORPORATION,
Plaintiffs-Appellants,

No. 11053 v.

SQUIRES, INC.,
Defendant-Appellee.

SQUIRES, INC.,
Defendant-Appellant,

No. 11054 v.

CAVU CLOTHES, INC.,
MONTIE M. BROHARD, JR., and
THE MACK SHIRT CORPORATION,
Plaintiffs-Appellees.

APPEALS from the United States District Court for the Southern District of Ohio, Western Division.

Decided September 8, 1950.

Before HICKS, Chief Judge; SIMONS and MILLER, Circuit Judges.

MILLER, Circuit Judge. The plaintiffs below, as the owner and licensees of the two patents herein involved, brought this action against Squires, Inc., defendant below, claiming infringement of the patents and seeking an injunction and an accounting. The patents pertain to a sport shirt, one being a design patent and the other being a mechanical patent, both covering the same shirt. The District Judge found the design patent valid and infringed, from which the defendant has appealed. He found the mechanical pat-

ent invalid, from which ruling the plaintiff has appealed. The two appeals were heard together, and in this opinion the parties will be referred to in their capacities as plaintiffs and defendant in the Court below.

Montie M. Brohard, Jr., owner of the patents, made application for the design patent on December 23, 1944. The patent, design 146,895, was granted June 10, 1947. The application stated that Brohard had "invented a new, original, and ornamental Design for a Shirt," reference being made to the accompanying drawings showing front and rear views of the shirt. The claim was for "The ornamental design for a shirt, as shown."

Brohard filed his application for the mechanical patent on January 25, 1945, and mechanical patent 2,428,198 was granted on September 30, 1947. The application stated that objects of the invention were to improve effectiveness in providing maximum protection against cold and drafts, to provide a garment which presented a smooth unbroken bosom portion of agreeable appearance, and which could be worn in good taste either with or without a necktie or scarf, and to so construct the garment that the smooth unbroken bosom portion would be exposed to present an attractive plain front, when a coat was worn over the garment in a conventional manner. The shirt is characterized by a zipper closure, the upper terminus of which lies beneath the right collar flap so as to be concealed thereby. The zipper closure then extends diagonally downward in a prolongation of the inner line of the right collar point toward the right hip of the wearer, stopping at a point slightly below the belt line. From that point a vertical unfastened opening extends to the bottom edge of the shirt. This diagonal direction of the zipper closure on the right side of the wearer, together with the concealment of the

upper portion of the zipper by the long collar points, provides an unbroken front appearance with no break between the collar points or in the bosom area. When a coat is worn over the shirt the zipper closure is entirely concealed, presenting a shirt front with a smooth appearance and unbroken by any collar button, center seam or opening. The plaintiffs claim that when the shirt is worn without a coat the zipper closure diagonally prolonging the line of the collar point provides a stream-lined appearance; that the elimination of a center opening avoids the usual buckling found in conventional shirts; that when the zipper is open the throat and chest of the wearer are protected against strong winds which on account of the angle blow the flaps of the shirt against the chest instead of causing the shirt to billow; and that the diagonal zipper and the lower vertical opening avoids bulging when the shirt is worn inside the belt, and also provides an attractive appearance when worn outside the belt. The patent contains but a single claim which describes "A garment comprising a front and back, terminating in an upper neckline, a fold-over collar attached at said line and having flap portions overlying said front on opposite sides of the vertical center line of the front," with an unbroken front resulting from a diagonal zipper closure extending from the neckline towards the hip of the wearer on the same side with the upper terminus of the slide fastener lying beneath the collar flap so as to be concealed thereby.

The complaint charges the defendant Squires, Inc., a retailer in Cincinnati, Ohio, with selling sport shirts in Cincinnati which infringed both the design and mechanical patents. The defendant challenges the validity of each patent, on several different grounds, and denies infringement. The District Judge found with respect to the design patent

that the sport shirt covered by the patent disclosed "an unusually attractive appearance, the design being new, original, ornamental and the product of invention," and that in the eyes of an ordinary observer, giving such attention as a purchaser usually gives, the design of the "Corsair" sport shirt sold by the defendant was substantially the same as that covered by the design patent. As to the mechanical patent, he found that in view of the state of the prior art the features of construction disclosed by the patent "although novel and useful, represented only the exercise of mechanical skill rather than patentable invention." He held the design patent valid and infringed by the defendant. He held the mechanical patent invalid.

The statutory requirements for a design patent differ somewhat from those for patentable inventions generally. Sec. 73, Title 35 U. S. C. provides—"Any person who has invented any new, original and ornamental design for an article of manufacture, not known or used by others in this country before his invention thereof, and not patented or described in any printed publication in this or any foreign country before his invention thereof, . . ." may, under certain conditions, obtain a patent therefor. As pointed out in *Gorham Company* v. *White*, 14 Wallace (81 U. S.) 511, 524-525, the purpose of the statute is to give encouragement to the decorative arts. It contemplates not so much utility as appearance; it protects a design only when it is new and original. The thing invented or produced for which a patent is given, is that which gives a peculiar or distinctive appearance to the article to which it may be applied, or to which it gives form. It is the new thing, or product, which the patent law regards. The construction to be given to the statutory requirements was stated by this Court in *Western Auto Supply Company* v. *American-*

National Co., 114 Fed. (2d) 711, C. A. 6th, as follows: When the idea is adapted or derived by analogy from prior usage, or when it is embodied in a design resembling the prior art in general appearance or central theme, there is no patentable invention; mere mechanical skill is insufficient; the adaptation of old devices or forms to new purposes, however convenient, useful, or beautiful they may be in their new role, is not invention. The same view was expressed in *Capex Company* v. *Swartz,* 166 Fed. (2d) 5, 6, C. A. 7th, wherein it was stated that a design patent must disclose inventive originality in design and ornamentation, and that mere mechanical skill of the artist is no more sufficient to constitute inventive art in the case of the design artist than in the case of the engineer. In *F. I. A. T.* v. *A. Elliott Ranney Co.,* 249 Fed. 973, C. A. 2d, it was pointed out that the test of invention in design patents is precisely like that in mechanical, the question being whether it was beyond the powers of the ordinary designer.

Applying such test to the design offered in the present case, we are of the opinion that it fails to meet the requirements. The features chiefly relied upon by the plaintiffs are the diagonal zipper closure, the concealment of its upper terminus under the righthand flap of the turn-over collar and the unbroken bosom front. All of these are disclosed by the prior art. Aronson 2,143,931, January 17, 1939, cited by the Patent Office, discloses a sporting jacket having a zipper opening which starts underneath the collar at the right of the wearer and extends diagonally to the center of the jacket where it then drops in a straight line. The Sears Roebuck catalogue No. 181, 1940, p. 407, also referred to by the Patent Office, discloses an aviator jacket styled "Mainliner" which is closed by a zipper

which starts at the right side of the collar and runs in a straight diagonal line to the bottom of the jacket at a point slightly right of the center of the jacket. Both Greenberg 1,993,297, filed May 24, 1933, and Gold 1,951,240, filed November 22, 1933, not cited by the Patent Office in the design application but cited by it in the mechanical application, show sport jackets with turn-over collars and zipper closures. The following patents were not cited by the Patent Office but were offered in evidence: Beach 570,081, 1896, discloses a garment with a turn-over collar, an opening running in a generally diagonal direction to the left side of the wearer and a straight opening dropping from that point to the edge of the garment, although the closure was apparently by snaps instead of by zipper. Turcotte Des. 129,909, filed September 8, 1941, discloses a diagonal zipper opening starting at one shoulder and extending across the body. Lardner Des. 130,692, filed September 27, 1941, discloses a reading jacket with a diagonal opening starting at the collar line in the back and running to the waist with an unbroken front appearance. Cooper 2,010,349, filed 1932, discloses a garment having a straight up and down zipper opening, offset, however, from the center of the garment with the upper terminus of the zipper concealed underneath the fold-over collar. Evidence was also introduced by the defendant showing that the Angelica Jacket Company of Chicago as early as 1941 manufactured and sold professional coats and smocks with diagonal zipper closures offset from the center of the collar. One of these, styled "Angelica White Twill" discloses the zipper closure starting on the right side of the collar extending diagonally to the right side of the wearer and then downward to a point at about the hips with the resulting unbroken front, rather similar to the zipper closure now under consideration. The

Patent Office rejected the application in each of three considerations of it, relying upon Aronson, Coleman and the Sears Roebuck Catalogue, and pointing out that angularly disposed slide fasteners which start in the vicinity of the collar are old and that the unbroken front panel was clearly taught by Coleman. Following an appeal to the Patent Office Board of Appeals and a remand to the Primary Examiner the patent was later granted following a showing of commercial success, but without retraction of previous Patent Office statements as to lack of invention over the prior art. In our opinion, the Brohard design patent does not show, in the light of the prior art, any exceptional talent beyond the range of the ordinary designer familiar with the prior art, and lacks the inventive quality required for a patentable design.

We are not unmindful of the attractive appearance of the shirt in question and its protective features against wind and drafts. The authorities above referred to clearly show that a garment may be pleasing in appearance and still not be the product of invention. Also the advantages resulting from a closure offset from the center are utilitarian rather than ornamental or decorative in character. *Ferd Messmer Mfg. Co.* v. *Albert Pick & Co.*, 251 Fed. 894, C. A. 8th; *Rowe* v. *Blodgett & Clapp Co.*, 112 Fed. 61, C. A. 2d.

Plaintiffs have strongly urged upon us the theory that there is a presumption of validity arising from the grant of the patent, and that the commercial success enjoyed by the patented shirt is strong evidence in support of the validity of the patent. Both of these arguments were considered and answered by this Court in *Western Auto Supply Co.* v. *American-National Co.*, supra, making it unnecessary to discuss them again at this time. See also

Wolverine Fabricating & Mfg. Co. v. *Detroit Gasket & Mfg. Co.*, 148 Fed. (2d) 399, 402, C. A. 6th.

The prior art fully sustains the District Court's conclusion that the features of construction disclosed by the Brohard mechanical patent No. 2,428,198, although novel and useful, represented only the exercise of mechanical skill rather than patentable invention. Locating the upper terminus of the zipper or slide fastener underneath the collar is disclosed by both Aronson 2,143,931 and Cooper 2,010,349. In both of them it is offset from the center. The diagonal closure is disclosed by Beach 570,081, Turcotte 129,909, Underdown 167,139 (1875), Lardner 130,692 and Wallace 1,973,421 (1932) and was used in the Angelica White Twill garments manufactured by the Angelica Jacket Company of Chicago. The unbroken front is the result of the diagonal closure. It is also shown by the Angelica White Twill garments. The particular location of the upper terminus of the zipper and the angle of the diagonal closure represented only the exercise of mechanical skill. The District Court properly held the patent invalid.

The judgment of the District Court is reversed in Appeal No. 11054 and is affirmed in Appeal No. 11053.

CLERK'S CERTIFICATE

I, J. W. Menzies, Clerk of the United States Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of record and proceedings in the case of *Squires, Inc.* v. *Cavu Clothes, Inc., et al.*, No. 11,054, as the same remains upon the files and records of said United States Court of Appeals for the Sixth Circuit, and of the whole thereof.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name, and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 16th day of November, A. D. 1950.

Clerk of the United States Court of Appeals for the Sixth Circuit.

CHARLES EL

No. 422

Supreme Court of the United States

OCTOBER TERM, 1950

CAVU CLOTHES, INC.,
MONTIE M. BROHARD, JR., and
THE MACK SHIRT CORPORATION,

Petitioners,

v.

SQUIRES, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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No. ————

Supreme Court of the United States

OCTOBER TERM, 1950

CAVU CLOTHES, INC.,
MONTIE M. BROHARD, JR., and
THE MACK SHIRT CORPORATION,

Petitioners,

v.

SQUIRES, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

Petitioners seek to review the judgment entered September 8, 1950, reversing the decree of the District Court, Southern District of Ohio, which had adjudged United States Letters Patent, Design No. 146,895 valid in law and infringed and had granted petitioners compensation and an injunction restraining the respondent from further infringement.

The opinion of the Court of Appeals (R. 410) is reported at 184 F. (2d) 30. The trial court did not hand down an opinion. Its Findings of Fact and Conclusions of Law are found in the Record at page 26.

The jurisdiction of this court is invoked under Section 1254 (1) of the Judicial Code.

SUMMARY STATEMENT OF MATTER INVOLVED

This case involves a Design Patent which the District Court held valid upon Findings of Fact and Conclusions of Law entered after a trial of several days. The evidence submitted by the patentee consisted principally of oral testimony including a detailed analysis and differentiation of the multitude of earlier patents relied upon by the respondent.

So far as can be determined, the Court of Appeals did not consider whether the Findings of Fact of the trial court were supported by substantial evidence or whether they were "clearly erroneous." The Court of Appeals simply expressed a different opinion as to the factual question of invention, reversed the District Court and held the patent invalid.

The facts of the case, very briefly stated, are as follows:

Montie Brohard, Jr. grew up in the custom-made shirt manufacturing business and was familiar with many unusual styles and hundreds of different kinds of shirts (R. 39, 41).

In 1941 he became interested in flying and soon realized the desirability of an attractive sport shirt designed especially for aviation. In 1944 he produced the shirt which he named "Tailspin" and which is the subject of the design patent here involved (Ex. 15).

The shirt is strikingly distinctive in appearance, being characterized by a diagonal zipper closure, the top of which is concealed underneath the right collar point, extending diagonally downward in a prolongation of the inner line of the collar point, toward the right hip. The collar points are long, and their concealment of the upper portion of the zipper, together with its diagonal direction, give the shirt an unbroken "bib" front appearance with no seam or opening or line between the collar points or in the bosom area (R. 41).

The unusual design of the shirt makes it suitable and attractive whether worn with or without a coat and for wear with or without a necktie. Even with a coat or sport jacket it can be worn without a tie since the opening is entirely concealed with no seam, pleat, button or other closure line breaking the smooth appearance of the shirt front (R. 42).

When the shirt is worn without a coat, the location of the zipper and its relation to the lines of the collar points give the shirt an unusual streamlined appearance of symmetry and balance (R. 41, 124). The inner lines of the collar points, one of which is extended by the zipper closure, together with the belt line, form an equilateral triangle with an unbroken center.

The angle of the zipper also makes the shirt unusually suitable and attractive for both men and women, so that the shirts are often worn as matching companion garments (R. 44, 45, 50, 51).

The new shirt was acclaimed by designers, artists and retailers. It met with spontaneous and unusual success and was the subject of a great many news items in style magazines, trade journals and similar publications (R. 46, 61-65). It was exhibited in the Museum of Modern Art and illustrated in the book "Are Clothes Modern" by Bernard Rudofsky (Ex. 11). The author, who is the Museum's Director of Apparel Research, wrote:

> "This shirt is remarkable for its departure from the archaic system of male and female garments, as distinguished by buttoning right and left. It represents an asexual shirt, so to say, and may be worn by men and women alike without their being accused of transvestism."

Illustrators and advertising men used the new shirt in an extraordinary number of cases to advertise a variety of

products, and as illustrations of articles and fiction (R. 58, 61, 63, 65, 67, 69, Ex. 6). As reported by Life Magazine, at a Texas Flying Show the new shirt was chosen as part of the best flying outfit for the All American wardrobe (R. 63, Ex. 6).

The United States Navy Nurse Corps was attracted to the shirt by its smart and good looking appearance, and adopted it as part of the official flight uniform for Navy nurses (R. 257, 59, 60. Ex. 5).

Immediately upon the exhibition of the shirt, the inventor was swamped with far more orders than he could produce (R. 100). Large and established manufacturing companies were struck by the shirt's novel appearance and sought and obtained licenses for its production (R. 198, 123, 125). These manufacturers met with a public reaction such as they had never before experienced (R. 127, 128, 200). One of them described it as "the shirt that walked out over the counter" because the retailer did not have to sell it, it just walked out of his store (R. 128). The retailer found that the shirt had "counter appeal," and a different style expression from other shirts (R. 144). An experienced shirt salesman thus described his reaction when he first saw the patented shirt.

> "I looked at it, and with the experience that I have had in the shirt business, it was extraordinary and displayed creative ingenuity that had gone into the garment, it was definitely different from anything that I had ever seen, in either the men's dress shirt or the men's sport shirt field. It was novel and in my opinion I thought had a terrific future" (R. 78, 79).

The application for the Design Patent was filed on December 23, 1944 and the patent issued on June 10, 1947 (Ex. G, Ex. 3).

Beginning in November, 1947 the Respondent, as a retail men's furnishing shop, purchased and sold sport shirts

bearing the label "Corsair." The "Corsair" shirt added its tribute to the novelty of the patented design, for in the opinion of every witness that testified on the subject, it is virtually identical in appearance. The respondent introduced no evidence in an effort to deny infringement.

The evidence presented by the Petitioners at the trial in the District Court consisted primarily of oral testimony relating to the novelty and invention of the patented design. There was a deposition from the Superintendent of the Navy Nurse Corps and a stipulation as to the testimony of Bernard Rudofsky of the Museum of Modern Art. Six other witnesses, however, all of whom were men of many years of practical experience in the shirt industry, appeared in person before the trial court. The trial court therefore was in a position to judge their veracity and determine the weight to be given to their testimony.

The Respondent introduced in evidence a multitude of assorted earlier patents and garments. The Petitioners presented oral testimony carefully analyzing each of these instances of prior art, differentiating them from the design in suit and explaining how significant the distinctions are in the industry (R. 230-248).

The District Judge, who had seen and heard these witnesses, made Findings of Fact included among which are the following:

> "6. The sport shirt shown by Design Patent D-146895, discloses an unusually attractive appearance, the design being new, original, ornamental and the product of invention.
>
> 7. When the sport shirts manufactured by Cavu Clothes, Inc. and the Mack Shirt Corporation under said patent were offered to the trade they met with remarkable and unusual acceptance and approval on the part of both the retailers and the consuming public. Such acceptance is persuasive that the design was

new, distinctive and attractive to the eye of the average purchaser."

The trial court held, therefore, that the patent was valid and infringed.

The Court of Appeals reversed the case, holding the patent invalid for lack of invention. The Court did not find Mr. Brohard's design anticipated by any particular patent or garment, but pointed to some as "rather similar" and containing one or another of the principal features of the patent in suit. The Court held that "in our opinion, the Brohard design patent does not show, in the light of the prior art, any exceptional talent beyond the range of the ordinary designer familiar with the prior art, and lacks the inventive quality required for a patentable design" (R. 416).

The Court of Appeals does not refer to the testimony as to invention which was presented to the trial court. There is no consideration of the question whether the Findings of Fact of the District Court were based upon substantial evidence. There is no holding that such findings were "clearly erroneous." The Appellate Court merely substituted its opinion on the factual question of invention for that of the trial court which had seen and heard the witnesses.

THE QUESTION PRESENTED

Where a District Court, after seeing and hearing the witnesses, has found as a fact that a patent involves invention and is valid, may a Court of Appeals, without considering whether that finding is based upon substantial evidence, or is clearly erroneous, substitute its own contrary opinion as to the fact of invention and reverse the decree of the trial court?

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The question whether an Appellate Court should accept factual findings of a District Court based upon substantial evidence is one of fundamental importance to the Federal Appellate practice, affecting hundreds and thousands of cases.

We believe the action of the Court of Appeals on this question is in conflict with the decisions in the other Circuits.

We believe the Court of Appeals has decided this important Federal question of appellate procedure in a way which is in conflict with applicable decisions of this Court.

We believe this Court has already decided the question, but if not, it certainly is one that ought to be settled.

We believe that, in ignoring the effect of the factual decision of the District Court, the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

BRIEF

A. The Question of Invention Is One of Fact.

This Court has repeatedly held that whether a patent involves a sufficient advance over the prior art to constitute invention is a question of fact.

In *Thomson Co.* v. *Ford Motor Co.*, 265 U. S. 445, 446 (1924), it is unequivocally stated:

> "The question whether an improvement requires mere mechanical skill or the exercise of the faculty of invention, is one of fact; . . ." (Citing earlier cases).

In *Williams Co.* v. *Shoe Mach. Corp.*, 316 U. S. 364, 367 (1942), it is said:

> "These findings are to the effect that the new combinations, while they involved old mechanical con-

> structions, combine these in a new way so as to produce an improved result. These are findings of fact, despite the petitioner's apparent contention of the contrary, and we will not disturb such concurrent findings where, as here, there is evidence to support them."

Whatever doubt may have existed in spite of such cases as the foregoing must now be ended by the recent case of *Graver Mfg. Co.* v. *Linde Co.*, 336 U. S. 271 (1949).

B. Findings of Fact by the Trial Court Must Be Accepted by the Appellate Courts Unless Clearly Erroneous.

The principle, which has long been generally followed by the Federal Appellate Courts, is now incorporated in Rule 52(a) of the Federal Rules of Civil Procedure as follows:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

As this Court said in the *Graver* case, *supra,* at page 275 of 336 U. S.:

> "The rule requires that an appellate court make allowance for the advantages possessed by the trial court in appraising the significance of conflicting testimony and reverse only 'clearly erroneous' findings."

In the other Circuits the Courts of Appeals have followed this rule in a great many cases and have directed their review to the question of whether there was substantial evidence to support the findings. Among the more recent examples there is, from the First Circuit, the case of *B. F. Sturtevant Co.* v. *Massachusetts Hair and Felt Co.*, 122 F. (2d) 900 (1941).

In the Second Circuit there is *American Pad and Textile Co.* v. *Cluff Fabric Products,* 139 F. (2d) 696 (1944), and in

the Third Circuit, *Hazeltine Corporation* v. *General Motors Corporation,* 131 F. (2d) 34 (1942). In the Seventh Circuit there is *Ray-O-Vac Co.* v. *Goodyear Tire & Rubber Co.,* 136 F. (2d) 159 (1943), affirmed by this Court, which likewise accepted the factual findings, in *Goodyear Co.* v. *Ray-O-Vac Co.,* 321 U. S. 275 (1944).

In the Eighth Circuit there is *Gasifier Mfg. Co.* v. *General Motors Corporation,* 138 F. (2d) 197 (1943), and in the Ninth Circuit such cases as *Crowell* v. *Baker Oil Tools,* 153 F. (2d) 972 (1946). In fact, the Sixth Circuit recognized the rule in *O'Leary* v. *Liggett Drug Co.,* 150 F. (2d) 656 (1945).

C. The Court of Appeals Reversed This Case Without Considering Whether the Trial Court's Findings of Fact Were Clearly Erroneous or Whether They Were Supported, as They Are, by Substantial Evidence.

The Court of Appeals in its opinion did not even mention the evidence introduced by the Petitioners to prove the novelty and inventive nature of the patented design. There is no consideration of whether that evidence formed a substantial basis for the trial court's factual finding. The Appellate Court did not hold that such finding was "clearly erroneous" or even discuss that question.

The Court of Appeals did not observe Rule 52(a), for so far as can be determined it gave no regard to the opportunity of the trial court to judge of the credibility of the witnesses. This was not a case like *Midland Flour Milling Co.* v. *Bobbitt,* 70 F. (2d) 416 (C. C. A. 8, 1934) where the evidence was by deposition and the Appellate Court was in just as good a position to weigh it and determine factual issues. Here the evidence of the Petitioners consisted almost entirely of oral testimony and visual demonstration of the distinctions between the new design and the variegated examples of prior art collected by the Respondent.

All that the Court of Appeals did was to refer to some of the earlier patents and garments and express its own opinion, that in view thereof the patented design represented not true invention but only the skill of an ordinary designer. There is no holding that the contrary opinion of the trial court is unsupported and manifestly wrong.

In so doing the Court of Appeals departed from the standard of appellate review applied by this Court in the *Graver* case as follows (Pg. 279 of 336 U. S.).

> ". . . The record in this case, while not establishing to a certainty that the findings are right, falls far short of convincing us that they are clearly erroneous. We think that the rules that govern review entitle the trial court's conclusions to prevail. . . ."

CONCLUSION

In this case the Court of Appeals reversed a factual finding of the trial court without any determination that such finding was unsupported by the evidence or clearly erroneous. In so doing the Court departed from a basic and long established principle of appellate review, which is now incorporated in the Federal Rules of Civil Procedure, and failed to follow the standards established and observed by this Court.

This error is not only destructive of the Petitioners' rights, but involves so important a general principle of legal procedure that this Court should grant certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 422

CAVU CLOTHES, INC., MONTIE M. BROHARD, JR., AND THE MACK SHIRT CORPORATION,
Petitioners,

vs.

SQUIRES, INC.,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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SUPPLEMENTAL STATEMENT OF MATTER INVOLVED.

Petitioners' statement of the matters involved in this case does not state the facts as they were presented to the Court of Appeals, and is merely an argumentative statement of the so-called "commercial success" of the petitioners' sport shirt products, upon which petitioners relied not only in the Patent Office to obtain issuance of the patents in suit, but also to sustain validity of the patents in this action.

Although the Court of Appeals' holding that the design patent in suit is invalid is attacked by petitioners, there is scarcely a mention of the large number of prior art

patents and publications which were so close to the disclosure of the design patent in suit as to leave no possible room for patentable invention under the Constitution and Statutes of the United States relating to patents.

It is significant that the supplemental record containing copies of the prior art patents and publications was not filed in the Supreme Court with the petition for certiorari, and only a single certified copy thereof was subsequently filed in the Supreme Court after insistence by respondent that the record before the Court was incomplete. Copies of this supplemental record have not been reproduced by petitioners in sufficient numbers to permit the members of the Court to inspect the prior art which is a part of the record in this case, and to which the opinion of the Court of Appeals specifically refers.

Petitioners' statement of the matter involved is so inadequate that we deem it necessary to supplement the statement so that this Court may have some idea of the subject matter which was before the Court of Appeals, and upon which its decision of invalidity was based.

THE PRINCIPAL QUESTION BEFORE THE LOWER COURTS WAS WHETHER THE PATENTS IN SUIT WERE VALID IN VIEW OF THE PRIOR ART. THERE WAS NO FACTUAL CONTROVERSY AS TO THE PRIOR ART.

This is an ordinary patent case involving the usual issues of validity and infringement, in which the record shows that two patents were issued to the same applicant, Montie M. Brohard, Jr., for a sport shirt having a zippered closure running diagonally from the neckband to the hip of the wearer. The District Court found one of the patents, No. 2,428,198 (R. 367) to be invalid, and found the other patent, Design No. 146,895 (R. 365) to be valid and infringed. Both patents illustrate the same shirt, and both patents were rejected by the Patent Office as involv-

ing no invention, but were finally issued after a showing in each application of a so-called "commercial success" of the sport shirt illustrated, the same identical instances of sales and acceptance being used by the applicant to obtain allowance of both of the patents in suit.

The District Court wrote no opinion.

The Court of Appeals held both patents to be invalid, citing in its opinion (R. 410-417) the prior art patents and publications which were before it.

These prior art patents and publications, with the exception of portions of the Angelica company catalog Exhibit V-1 (R. 399-401), were not included in the printed appeal record, but were, by stipulation (R. 407) presented to the Court of Appeals in folders containing only the prior art exhibits and portions of the Patent Office file histories. These exhibits are not included in the printed record presented with the present petition for certiorari. Some idea of the prior art may, however, be obtained from the opinion by the Court of Appeals (R. 414) wherein that Court said:

> "The features chiefly relied upon by the plaintiffs are the diagonal zipper closure, the concealment of its upper terminus under the righthand flap of the turnover collar, and the unbroken bosom front. All of these are disclosed by the prior art."

Most of the prior art patents and publications in evidence were never considered by the Patent Office. One example is the catalog of the Angelica Jacket Company (R. 399-401). This catalog, admittedly authentic and prior in date to the alleged Brohard invention, fully supports the Court of Appeals' statement in its opinion (R. 415), that

> "the Angelica Jacket Company of Chicago, as early as 1941, manufactured and sold professional coats and smocks with diagonal zipper closures offset from the

> center of the collar. One of these, styled 'Angelica White Twill', discloses the zipper closure starting on the right side of the collar extending diagonally to the right side of the wearer and then downward to a point at about the hips, with the resulting unbroken front rather similar to the zipper closure now under consideration."

This statement by the Court of Appeals is not in conflict in any way with any finding entered by the District Court.

In view of the prior art and the law applicable to design invention, the Court of Appeals stated:

> "Applying such test" (of patentable design invention) "to the design offered in the present case, we are of the opinion that it fails to meet the requirements." (R. 414.)
>
> "In our opinion the Brohard design patent does not show, in the light of the prior art, any exceptional talent beyond the range of the ordinary designer familiar with the prior art, and lacks the inventive quality required for a patentable design." (R. 416.)

Plaintiffs seek to imply by their "Summary Statement of Matter Involved", by their "The Question Presented" and by their "Reasons Relied on for Allowance of the Writ", that the Court of Appeals decided a question of fact contrary to a finding which the District Court made upon the basis of conflicting oral testimony. That is not the case.

The plaintiffs called as witnesses, the patentee Montie M. Brohard, Jr., and six merchants, who were the only witnesses before the Court.

None of these witnesses testified, or could have testified, as to the novelty or patentably inventive character of the design patent over the prior art. They did testify as to the marketability or "commercial success" of the plaintiffs' patented shirt. They gave their opinions as to the

attractiveness of the design, and Mr. Brohard, for example, pointed out the minute differences between the prior art patents and publications and the design patent as such differences clearly appear from the documentary exhibits themselves.

There was never any dispute that the prior art patents and publications, and the prior garments made and sold by the Angelica Jacket Company, Sears Roebuck & Co., Fox-Knapp Mfg. Co., and Shirtcraft Co., Inc., all of which were before the Court, were genuine and of dates admittedly long prior to the Brohard alleged invention. In fact, it was *stipulated* that copies of patents and publications were admissible "with the same force and effect as duly certified copies thereof, subject to correction if error appear" (R. 214). It was pursuant to that stipulation that each of the patents and publications referred to by the Court of Appeals was offered and received in evidence. There was never any dispute as to what the prior art patents and publications disclosed, as of course there could not be, since the disclosures were pictorial.

The patent in suit being only a pictorial representation of a simple garment required no explanatory testimony, and the prior art patents were placed in evidence by defendant's counsel without calling any witnesses (R. 214).

The simple fact is, therefore, that the question of validity was decided by the District Court upon a mere comparison of the patent with the prior art documentary exhibits. It was not upon the basis of oral testimony involving any disputes of fact which the Court had to resolve. In addition, the District Court decided that the Brohard shirt was attractive, useful, and commercially successful. The Court of Appeals did not disagree with these findings, because of course a design may be attractive, useful, and successful, without being a patentable inventive advance over the prior art.

The Court of Appeals' judgment that the Brohard design patent is invalid was based entirely upon the application of the long established law of patentable inventive design to the facts which appeared from a simple comparison of undisputed and stipulated patents and publications.

The history of the Patent Office actions resulting in the patent in suit, Exhibit G (R. 214), is not reproduced in the printed record presented by petitioners, but it was before the Court of Appeals and considered by it. In its opinion the Court pointed out that the application for the patent in suit was repeatedly and finally rejected as unpatentable over three prior art references which taught

> "that angularly disposed slide fasteners which start in the vicinity of the collar are old and that the unbroken front panel"

was also old (R. 416). The Court went on to say:

> "Following an appeal to the Patent Office Board of Appeals and a remand to the primary examiner, the patent was later granted following a showing of commercial success, but without retraction of previous Patent Office statements as to lack of invention over the prior art." (R. 416.)

It was one of the contentions of defendant that the Patent Office has no statutory authority to issue a patent upon an article that is a "commercial success", unless it is also an *invention,* and that since the record shows that the Brohard design patent was denied by the Patent Office to be an invention, but was patented because of its "commercial success", the grant was beyond the authority of the Patent Office, and the patent was void as a matter of law. It is apparent from the above quotation that the Court of Appeals agreed with this contention.

It is apparent from the above statements that this was not a case in which the Court of Appeals substituted its

opinion for a finding of fact entered by the District Court as the result of hearing and observing the oral testimony of witnesses at the trial. It is, on the contrary, apparent from the true facts that the Court of Appeals found the design patent in suit invalid as a matter of law, because "it fails to meet the requirements" as to a "*patentable* design", and because, as a matter of law, the Patent Office had no right or authority to issue a patent upon a showing of "commercial success" where the Patent Office itself had found that there was a lack of invention over the prior art.

THE REVERSAL BY THE COURT OF APPEALS OF THE DISTRICT COURT'S HOLDING OF VALIDITY WAS NOT IN CONFLICT WITH THE DECISIONS OF THIS COURT.

Petitioners seem to believe that this Court's decision in *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U. S. 271, prevents the Court of Appeals from reversing in this case, no matter what its opinion was as to validity of the Brohard design patent.

We do not so understand the *Graver* case. The single sentence from the Graver opinion quoted at page 8 of the petition and brief, seems to us to be quite correct, a restatement of a long established rule, and in no way in conflict with the decision now under attack. The sentence quoted in petitioners' brief appears in a portion of the opinion in the *Graver* case, dealing with "conflicting testimony". In that case there had been "concurring opinions" of the District Court and the Court of Appeals. Here the contrary is true. In the *Graver* case the patent involved intricate matters which were demonstrated in scientific demonstrations, and required a trial of three weeks, during which the trial Judge necessarily visited a number of laboratories to observe welding practices, viewed motion pictures of welding practices, and heard many experts and other witnesses whose testimony was conflicting.

Here the question is whether the location of a shirt zipper, as compared with its location by prior designers, was an invention. This case did not involve intricate matters—it did not require "scientific demonstrations"—it did not require a trial of three weeks, but of only two days—the Judge was not required to visit laboratories or observe shirt making practices or view motion pictures—and the District Judge did not have to listen to experts or conflicting witnesses. Almost the entire time spent at the trial involved the giving of testimony relative to the so-called "commercial success" of the Brohard shirt—a fact which, if true, could not make an invalid patent into a valid one.

The true rule of the *Graver* case, according to our understanding, is that the Supreme Court is not a court to correct errors in fact finding, and will not "undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." That it will review even a "concurrent" finding of validity—where the patent grants a monopoly upon a trivial improvement for which patent protection was never intended by the Constitution, is clearly set forth in the recent opinion in *Great Atlantic & Pacific Tea Co.* v. *Supermarket Equipment Corp.*, 95 L. ed. 118, decided December 4, 1950. We have found no appellate court unwilling to reverse a finding of validity of a patent simply because the District Court found it to be valid. Yet in substance what petitioners now seek is to have this Court rule that such must be the practice.

This Court, in the *A. & P.* decision, restated the rule expressed by it in the *Graver* case, and even though in the *A. & P.* case both the District Court and the Court of Appeals had found the patent in suit to be valid and to have involved invention, reversed the judgment holding the patent to be invalid, expressly stating that in so doing

they were not reversing as to any finding of fact. What this Court there said in its opinion by Mr. Justice Jackson was:

> "The defect that we find in this judgment is that a standard of invention appears to have been used that is less exacting than that required * * *. It is on this ground that the judgment below is reversed."

In that same decision it was stated in the opinion by Mr. Justice Douglas, with whom Mr. Justice Black concurred:

> "The standard of patentability is a constitutional standard; and the question of validity of a patent is a question of law."

In this concurring opinion it was further stated that:

> "The court now recognizes what has long been apparent in our cases: that it is the 'standard of invention' that controls. That is present in every case where the validity of a patent is in issue. It is that question which the court must decide. No 'finding of fact' can be a substitute for it in any case. The question of invention goes back to the constitutional standard in every case."

When the Court of Appeals in this case stated that the design patent in suit "fails to meet the requirements" of the law, it was stating precisely what this Court said in the *A. & P.* case, and the many others which preceded it.

RULE 52(a) WAS NEVER INTENDED TO PREVENT AN APPELLATE COURT FROM REVIEWING FACTS AS TO WHICH THERE WAS NO DISPUTE AND WHICH APPEAR FROM DOCUMENTARY EVIDENCE.

It has long been established by many decisions, that a Court of Appeals is as well able as the trial court to interpret undisputed documentary exhibits. It has never been considered to be in conflict with Rule 52(a) of the Rules of Civil Procedure for an appellate court to reverse a judg-

ment even though that necessarily reversed a finding of fact where such a finding was based upon documentary evidence rather than conflicting oral evidence of witnesses whose credibility was judged by the District Court.

In referring to Rule 52(a), this Court in its opinion by Mr. Justice Reed in *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 394, 395, said:

> "* * * That rule prescribes that findings of fact in actions tried without a jury 'shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.' It was intended, in all actions tried upon the facts without a jury, to make applicable the then prevailing equity practice. * * * The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The findings were never conclusive, however. A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

In that case a number of the findings were based upon inferences drawn from agreements and written documents. The Supreme Court being clearly as able to draw its own inferences from such documentary exhibits as was the lower court, did so, reversing the court below.

In the recent decision by Judge Yankwich in *Pacific Portland Cement Co.* v. *Food M. & C. Corp.*, 178 F. 2d 741 (CA 9) the Court said:

> "We may make our own inferences from undisputed facts or purely documentary evidence, for to use the colorful language of the Court of Appeals for the Third Circuit, the rule (52a) does not operate 'to entrench with like finality the inferences or conclusions drawn by the trial court from its fact findings.'"

In *Orvis* v. *Higgins,* 180 F. 2d 537 (CA 2), the Court of Appeals in its opinion by Judge Frank, analyzed the decision in the *Gypsum* case and stated, with gradations, the extent to which the appellate court may reverse a judgment based upon a finding of fact. Among these the Court stated that:

> "If he" (the District Judge) "decides a fact issue on written evidence alone, we are as able as he to determine credibility, and so we may disregard his finding." (Citing numerous authorities.)

A review of the effect of "Findings in the Light of the Recent Amendments" in an article written by Judge Yankwich, appears in 8 FRD 271. As he points out therein, Courts of Appeal and this Court have frequently taken their own view as to the presence or absence of invention in a patent when it has been a simple matter of comparison of the patent with the prior art.

In this case the Court of Appeals was faced with no conflicting testimony as to the nature of the patent in suit or as to the nature of the prior art. That being so it could, of course, make its own comparison and draw its own conclusions as to validity. In doing so, it did not disturb any finding of fact. It held merely that the patent in suit did not come up to the standards of invention required for a patentable design. There was no dispute as to the file history of the patent in suit and the Court was as well able to draw inferences from it as was the District Judge. The Court of Appeals drew the inference that the patent in suit had been granted only upon a so-called showing of "commercial success", and was therefore invalid.

CONCLUSION.

There is no ground for the grant of a writ of certiorari in this case. There is no conflict of decision between Courts of Appeal which should be resolved by this Court. The Court of Appeals in this case did not decide any federal question contrary to the established rules in patent cases, or contrary to the decisions of this Court. There is no great public question to be resolved as this is a simple patent suit between private parties, which in fact involves an insignificant sum and a palpably invalid patent.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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